

The Current Situation Concerning Investigative and Operational Search Powers of a Crime Investigator in Criminal Proceedings in the Former Soviet Union

Renat A. Mediyev¹

¹Karagandy Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan named B. Beisenov Karagandy, Kazakhstan

Correspondence: Renat A. Mediyev, Karagandy Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan named B. Beisenov Karagandy, Kazakhstan.

Received: February 28, 2015 Accepted: March 20, 2015 Online Published: April 26, 2015

doi:10.5539/res.v7n6p255

URL: <http://dx.doi.org/10.5539/res.v7n6p255>

Abstract

This article studies legal situation concerning the use of operational search activity results in criminal trial and, namely, the procedure of execution of crime investigator's investigative and operational search powers within the framework of criminal procedure legislation of the former Soviet Union (in the case of Ukraine, Georgia, Estonia, Latvia, Lithuania, Moldova, Russia, Belarus and Kazakhstan). This study will allow gaining greater insight into the essence and prospects of further development of criminal proceeding in the context of modernization of the criminal justice system and its bringing to conformity with the international standards in the Republic of Kazakhstan. On January, 1, 2015 the new Criminal Procedure Code of the Republic of Kazakhstan is put into force. One of its key innovations is Chapter 30 regulating undisclosed investigative activities. Thus, this article studies the legal situation concerning the use of operational search activity results which according to the new Criminal Procedure Code of the Republic of Kazakhstan represent undisclosed investigative activities. On the basis of the study carried out the author has found out certain problems to be solved in the short term, has developed his own viewpoint and offered certain proposals concerning some points at issue.

Keywords: the former Soviet Union, the Criminal Procedure Code, Operational Search Activity Act, a crime investigator, bodies of inquiry, jurisdiction, criminal proceedings, an evidence, sources, admissibility, investigative activities, undisclosed, summary procedure

1. Introduction

Once within the former Soviet Union the criminal procedure legislation was based upon the criminal procedure basics of the USSR. After gaining their independency some of the countries started the process of criminal justice integration into the European standards. This process took place only in Baltic countries.

Geographical and political separation of the USSR republics didn't cause immediate changes in their criminal justice. Over another several years in these countries the criminal justice was based on the Criminal Procedure Codes of the appropriate Soviet Republics (Tomin & Polyakov, 2012).

However, the need to provide a legislative framework for the new vision of the former Soviet criminal justice which shall cover all countries of the Commonwealth, has caused an idea to work out a model laws and regulations for Member Nations of the Commonwealth of Independent States (CIS).

These laws and regulations was worked out o the basis of a concept of the unified Model Criminal Procedure Code for Member Nations of the CIS which was drawn up according to Resolution on Legal Groundwork for Integration Development of CIS of the Inter-parliamentary Assembly of CIS Member States dated by October, 28, 1994, and adopted by this Assembly on February, 17, 1996 (Model Criminal Procedure Code for Member Nations of the Commonwealth of Independent States, 1996).

As envisioned by its writers, the Model Criminal Procedure legislation should have provided a legislative framework for hybrid criminal proceedings based on free evaluation of evidence. According to the concept, during Code elaboration two main aims have been pursued: 1) To secure a procedure of criminal procedure activity which would be to the utmost similar in all countries of the CIS and be based on high legal standards of

personal rights protection; 2) To promote development of democratic judiciary reform within the CIS. Model Codes were not of binding, but of advisory nature. The conception stipulated the following: “The Model Code may be accepted as a whole or partly, immediately or step by step, or may not be accepted at all”.

As far as the Model Criminal Procedure Code (CPC) is concerned, it stipulates new procedure guides. Thus, it significantly broadens the meaning of sources of criminal procedure law. The Code mentions the following as such: generally accepted principles and norms of international law; constitutional provisions; international treaties to which the appropriate country is a party; criminal procedure codes; other law governing criminal procedure matters (which includes comprising their norms into criminal procedure codes).

The foremost principle of the Model CPC is represented by various inviolability rights: inviolability of a person, residence and property, which has been guaranteed by the Constitution of Member Nations of the CIS, as well as by that of the Republic of Kazakhstan which is mentioned there as a democratic, secular, social and law-governed state with a human, his life, rights and freedoms being the supreme value (the Constitution of the Republic of Kazakhstan, 1995).

At this in the course of reforms many provisions of the Model code have been adopted by new national Criminal Procedure Codes of CIS countries. For instance, in the Republic of Kazakhstan the Criminal Procedure Code was adopted on December, 13, 1997, in the Republic of Belarus on July, 16, 1999, in the Russian Federation on December, 18, 2001.

At this relations formed in the course of operational search activity are to be governed by Operational Search Activity Act. In the Republic of Kazakhstan this Act was adopted on September, 15, 1994, in the Russian Federation on August, 12, 1995, in the Republic of Belarus on July, 9, 1999.

As far as the Baltic Republics, Estonia, Latvia and Lithuania, and their geographical neighbor, the Republic of Moldova, are concerned, it should be noted that these states have fundamentally reformed their legislation and transformed operational search activity into means of evidentiary information gathering. At this the specific feature is that operational search activity is not included into the legislation and is not governed by criminal procedure. Legislators of these states consider any activity aimed at detection, solution and investigation of crimes should be governed by a criminal procedure law. Ukrainian (the CPC dated April, 12, 2012) and certain Georgian legislators (the CPC of Georgia dated 2009) are of the same view. At this Ukraine wishes to resign from the CIS and then switch to the criminal proceedings conforming to the European standards.

At this in the Republic of Kazakhstan fundamental reforming of criminal proceedings and the entire system is observed. Thus, on January, 1, 2015, in the Republic of Kazakhstan a new Criminal Procedure Code is put into force. It introduces new Chapter 30 defining undisclosed investigative activities as means of evidence gathering (the Criminal Procedure Code of the Republic of Kazakhstan, 2014).

2. Procedure

Within the former Soviet Union investigative and operational search powers of a crime investigator can be retraced due to the fact that they are procedurally and legally regulated by Operational Search Activity Act, depending on the specifics and the degree to which their norms are stated and relying on normative legal documents, the Constitution of the Republic of Kazakhstan, the Criminal Procedure legislation of the Republic of Kazakhstan and other states and appropriate questionnaires and interviews.

3. Results

On the basis of the used procedure of studying the objectives, certain problems concerning the crime investigator's powers in the course of his investigative and operational search activity were detected. This allowed working out and justifying a range of provisions aimed at improvement and specialization of criminal procedure norms governing investigative and operational search powers of a crime investigator in criminal proceedings.

4. Discussion

But prior to considering the current situation with crime investigator's powers in criminal proceedings it should be noted that up to 1997 in the Republic of Kazakhstan criminal proceedings were governed by the Criminal Procedure Code of the Kazakh Soviet Socialist Republic. The same concerns the remaining part of the former Soviet Union.

Through the example of the Criminal Procedure Code of the Kazakh Soviet Socialist Republic as amended and supplemented on October, 10, 1997, we can see the first moves for interpretation of operational search activities in proving. Thus, according to Article 61-3 of the CPC of the Kazakh Soviet Socialist Republic concerning Evidence

of Operational Search Activities, any facts gained in the course of operational search activities can be deemed criminal evidence after they have been verified according to the requirements of the existing Code (the Criminal Procedure Code of the Kazakh Soviet Socialist Republic, 1997).

Yet according to Article 130 of the CPC of the Republic of Kazakhstan, 1998, there is no legal guidelines concerning the use of operational search activity results in criminal proceedings. This preconditions the lack of a unified approach to this task in criminal proceedings (the Criminal Procedure Code of the Republic of Kazakhstan, 1998).

After Law No.163-II of the Republic of Kazakhstan On amendments and supplements to certain legislative act of the Republic of Kazakhstan concerning intensification of actions against the organized crime and corruption, dated March, 16, 2001, was put into force, Article 130 of the CPC of the Republic of Kazakhstan was amended and supplemented by Sections 2,3,4,5. This norm governs the procedure of delivering operational search activity results for deposition. Through this procedure the facts gained in the course of operational search activity by officials of a body effecting operational search activity or a person cooperating with such a body on a confidential basis, receive the status of evidence. Besides, the norm extends the framework and scope of discretionary powers of persons effecting operational search activity (Shymukhanov, 2008).

Kazakhstani processualist scientists have given different points of view on this issue. Thus, for instance, Toleubekova, B. H., noted that “operational search activity has intelligence and search nature; it is mostly aimed at gaining initial information about persons, facts, events and circumstances of operational interest; about elements of crime and characteristics of persons who have committed it; about persons fleeing from bodies of inquiry, investigation and court and avoiding criminal sanctions; about missing and other wanted persons; about persons compassing, organizing, committing and having committed some crimes and etc. This information is gained through general and special operational search activities (Article 11), is of non-procedural nature and obtained results are not considered to be evidence” (Toleubekova, 2005).

According to Toleubekova, B., this is due to the fact that sources and procedure of gaining information are non-procedural and are not permitted by the Criminal Procedure Code of the Republic of Kazakhstan, since the stated activities were not limited to investigative and other procedural activities.

For instance, Article 237 of the CPC of the Republic of Kazakhstan (on monitoring telephone and other types of conversations) has some gaps with regard to procedural means of transforming operational search data obtained through shooting, filming, video and audio records into evidence.

This happens due to the necessary participation of witnesses or, if necessary, experts before initiation of a criminal case, in the course of preliminary investigation or operational search activities in order to verify information gained by means of technical aids, regardless of when this information was obtained. Otherwise the information (facts) can't be admitted to be evidence (Toleubekova, 2005).

With this respect, Jursimbaev, S., specifies that “facts taken directly by an official of an operational search body in the course of operational search activities can be used as evidence after interrogation of this official as a witness. Facts taken directly by a person cooperating with operational search bodies on a confidential basis can be used as evidence after interrogation of the stated person as a witness, a victim, a suspect (an accused) (Jursimbaev, 2011).

With regard to criminalistical tactics Ginsburg, A. and Belkin, A. noted that the use of operational search information in investigation is of organizational and legal nature and this defines the specific conditions of its use of operational search by investigative bodies. Regarding these conditions admissibility of such use will be provided by the following: compliance of operational search activity and process of obtaining its results effected by all cooperating parties with legal regulations; separation of powers of all cooperating parties in the course of obtaining and using operational search information; a possibility of cooperating parties to choose a form and means of obtaining and using operational search information; integrated use of efforts and means in the course of obtaining operational search information; timely sharing of operational search information and facts of evidence by cooperating parties; an organizing role and procedural independency of a crime investigator in the course of the use of data gained through operational search activity; combination of public procedural and undisclosed operational search activity (Ginsburg & Belkin, 1999).

At this the following requirements to operational data should be observed: it should be reliable (evidence is considered reliable if verification proves that it corresponds to the facts, Section 5 of Article 128 of the CPC of the Republic of Kazakhstan); it should contain relevant facts (prove, disprove or cast doubt on existence of important circumstances, Section 3 of Article 128 of the CPC of the Republic of Kazakhstan); it should be

gained according to provisions of Operational Search Activity Act; it should be in good working order which allows perceiving it (regarding audio and video records), studying and using in the course of proving; its use shouldn't cause disclosure of information about arranging operational search activity, certain operational search measures, sources and means of obtaining information constituting state or other secrets protected by law; it should be prospective with regard to its use for investigative and judicial practice; its use should be tactically useful in the course of proving (Ginsburg & Belkin, 1999).

The CPC of the Republic of Kazakhstan, dated 1998, was elaborated on the basis of the criminal procedure legislation developed by Soviet scientist, i.e. when property was owned by the state and the Internet was not used in such a way and so commonly as it is used nowadays, when there was no e-mail, cellular communication and it was almost impossible to go to another country or transfer money abroad. Upon gaining independence and implementation of privatization a private property institution came into being. With this regard Prischepa, G. specifies that enacting the existing CPC a legislator couldn't have foreseen rapid development of private property, international relations, information systems and communication as well as criminal solutions allowing hacking computer systems of other states thousand kilometers away and committing theft of funds without going out. Yet if in the course of pre-investigation check certain preventive investigative measures are taken out of time or failed to be taken, it may cause grievous loss of evidence or undesirable effects in future. For instance, if a potential accused person gets to know about filling a statement and initiation of criminal prosecution, he may destroy all incriminating documents and things, get rid of property subject to confiscation, withdraw from his accounts or transfer abroad money earned through crime, leave the Republic and escape. If formerly, when there were no private enterprises and organizations, an official of a criminal investigation agency could surrender an official ID, enter any institution and obtain any required documents and information, nowadays the situation fundamentally changed. This fact can't be disregarded. Each private company has its own security service and it is not so easy to penetrate to its territory, not to mention obtaining some information or documents which are at private premises beyond high fences. In future as private property and privacy institutions will be strengthening, the situation will get even more challenging (Prischepa, 2009).

Especially since crime investigator's powers haven't changed, they are the same as in the Soviet times. For instance: an interrogation, a face-to-face confrontation, an arrest and seizure of correspondence, a search, an examination, a procedure of identification of people and things, an investigative experiment, sampling for comparative examination and etc.

As far as objectives of operational search activity are concerned, authorized bodies have the right to deliver materials showing operational search activity results according to a procedure stipulated by Article 130 of the CPC of the Republic of Kazakhstan dated December, 13, 1997 (as amended and supplemented as of July, 25, 2012). It says that "...the head of an inquiry body presents operational search activity materials to a body dealing with a criminal trial at his own's discretion".

As a result, a crime investigator gets only general data and operational divisions choose what data should be presented. This practice results in the fact that information of great value is not used. This procedure of investigative and operational search activity has been followed up to the present time.

But on July, 4, 2014, the President of the Republic of Kazakhstan signed a new Criminal Procedure Code aimed at modernization of the criminal proceedings system and bringing it to conformity with the International standards. The Code regulates a procedure and execution of operational search activities in the framework of criminal proceedings (Chapter 30 about undisclosed investigative activities). Thus, undisclosed investigative activities will not be executed without authorization of the prosecutor in order to prevent infringement of citizens' right to privacy (the Criminal Procedure Code of the Republic of Kazakhstan, 2014).

It should be noted that reading of a draft of the new CPC of RK (and namely Chapter 30) has come with controversy. But though processualists furiously opposed and denied drawing together of operational search activity and criminal procedure legislation, the practice of crime prevention and development of the theory objectively led to their harmonization. The more so since search functions are affected both in the course of operational search activity and in criminal proceedings. The definite drawing together of the legislation and this type of activity is also demonstrated by the criminal procedure norms concerning tracing persons fleeing from prosecution and governed by Operational Search Activity Act of the Republic of Kazakhstan (Operational Search Activity Act of the Republic of Kazakhstan, 1994), as well as by agency-level statutory acts.

In its turn, the drawing together of criminal procedure and operational search legislature led to reconsidering set views on certain criminal procedure institutions, expanded a body of evidence by using information obtained in the course of operational search activity in proving.

In spite of the fact that since January, 1, 2015, the most of general and all special operational search activities aimed at detection, solution and investigation of crimes will be regulated by the Criminal Procedure legislation of the Republic of Kazakhstan as “undisclosed investigative activities”, i.e. activities executed in the course of pre-trial proceedings without informing persons engaged in the criminal trial and interested in it according to the procedure and in cases stipulated by the existing Code (the Criminal Procedure Code of the Republic of Kazakhstan, 2014, Article 7), these activities are not innovative. With this regard it should be noted that according to the CPC of Ukraine such activities already exist, while in Georgia introduction of these investigative activities into the CPC has been attempted, though they were referred as “undisclosed (search) and secret” investigative activities. However, in the states considered regulation of these “undisclosed” investigative activities and a procedure of the use of their results are different.

At this, the Criminal Procedure Code of Ukraine and namely Chapter 21 about Undisclosed Investigative (Search) Activities deserves special attention. Thus, according to Article 246 of the CPC of Ukraine undisclosed investigative (search) activities are a kind of investigative (search) activities and information about conditions, a procedure and methods of their execution is not subject to disclosure except for the cases stipulated in the existing Code (the Criminal Procedure Code of the Republic of Ukraine, 2012).

According to Section 2 of Article 246 of the CPC of Ukraine about Reasons for Undisclosed Investigative (Search) Activities, such undisclosed investigative (search) activities as: audio and video surveillance of a person (Article 260), detention of correspondence (Article 261), survey and seizure of correspondence (Article 262), retrieval of information from transport telecommunication networks (Article 263), retrieval of information from electronic information systems (Article 264) are executed in cases if information about a crime and a person who has committed it can't be retrieved in another way. And such activities as: inspection of publicly inaccessible places, houses and other premises of a person (Article 267), survey of a person, a thing or a place (Article 269), audio and video surveillance of a location (Article 270), monitoring of crime commitment (Article 271), performing a special mission for detection of criminal activity of an organized crime group or a criminal organization (Article 272), undisclosed retrieval of samples for comparative study (Article 274) are performed only in case of grave or especially grave crimes.

Whereas, according to Section 4 of Article 232 of the new CPC of the Republic of Kazakhstan reasons for undisclosed investigative activities are represented by crimes commitment of which is punished by deprivation of liberty for a year or more, i.e. undisclosed investigative activities will be executed in case of crimes of little gravity and even if information about a crime and the person who has committed it, can be retrieved in another way, in other words, these activities are compulsory for all crimes.

According to Section 6 of Article 246 of the CPC of Ukraine a crime investigator (or even a prosecutor), or an operational division of authorized bodies by his order, has a right to perform undisclosed investigative (search) activities. And a decision about performing undisclosed investigative (search) activities is taken by crime investigator or a prosecutor and in cases stipulated by the Code by an investigating judge upon the motion of a prosecutor or a crime investigator by agreement with a prosecutor.

Whereas according to Section 10 of Article 232 of the new CPC of the Republic of Kazakhstan a procedure of undisclosed investigative activities is defined by law enforcement and special governmental authorities by agreement with the Prosecutor General of the Republic of Kazakhstan. According to Section 1 of Article 233 of the CPC of the Republic of Kazakhstan undisclosed investigative activities are performed by an authorized official by the order of a crime investigator, i.e. the crime investigator gives an order to operational divisions and rules according to requirements of the existing Code. And upon the order of a prejudicial inquiry agency a prosecutor authorizes undisclosed investigative activities (Section 1 of Article 234 of the CPC of RK, 2014).

According to Section 1 of Article 248 of the CPC of Ukraine a motion for authorization of undisclosed investigative (search) activity is examined by an investigating judge.

It should be noted that Ukrainian legal scholars consider that “prosecutor’s supervision can’t substitute for judicial control” (Mikhailov, 2013). And we completely agree with them. On our opinion, undisclosed investigative activities should be authorized by an investigating judge, while a prosecutor should only present a motion to the investigating judge for the authorization. Thus, a prosecutor will be engaged in a pre-trial procedure performing it by agreement with a crime investigator.

As for Georgia, in 2009 Chapter 16 of the draft of the CPC of Georgia defined operational search activities aimed at detection, solution and investigation of crimes as “undisclosed investigative activities”.

According to the draft of the CPC of Georgia dated 2009 undisclosed investigative activities were represented by

visual control, covert surveillance, including with the use of technical means, evidentiary purchase, controlled delivery, wire-tapping and record also performed with the use of technical means, retrieval and record of information from communication channels (by connection to a communication channel, a computer network, line communications and station sets) (Maishvili, 2010).

According to the draft of the CPC of Georgia dated 2009 a system of undisclosed investigative activities also includes: surveillance, arrest and seizure of communication dispatches (except for diplomatic mail), censoring correspondence, infiltration of an operating officer in a criminal group, creation of a secret organization aimed at infiltration in order to gain some information, and other undisclosed activities aimed at obtaining information.

The draft of the CPC of Georgia dated 2009 prohibited to perform any undisclosed investigative activities with regard to public interest, political, scientific, educating and religious organizations, mass media organizations and publishing companies if they didn't try to destroy the constitutional order of Georgia and/or its forcible overthrow, undermine the state's independence and/or if such an organization was not engaged in war or violence propaganda or stirring up national, religious or social hatred (Meishvili, 2010).

But the draft of the CPC of Georgia dated 2009 was not adopted and in the criminal procedure legislature dated 2010 a procedure of investigative activities in respect of criminal cases were left unchanged (United Nations Office on Drugs and Crimes, 2014).

It should be noted that in comparison a system of undisclosed investigative (search) activities set forth by the CPC of Ukraine and undisclosed investigative activities stipulated by the draft of the CPC of Georgia dated 2009 are the most similar. At this the norms of the Ukrainian legislation offer a wider range and more thorough legal regulation of undisclosed investigative means.

A viewpoint of legislators of the Baltic republics (Estonia, Latvia and Lithuania) and the Republic of Moldova with regard to the considered issue is also very interesting.

For instance, in the Republic of Estonia the norms of Operational Search Activity Act are included directly in Chapter 3¹ (Articles 126¹-126¹⁷ of the CPC) of the Criminal Procedure Code of the Republic of Estonia dated 2004 about Search Activity (the Criminal Procedure Code of the Republic of Estonia, 2008).

Section 1 of Article 126¹ of the CPC of the Republic of Estonia defines search activity as processing of personal data in order to perform a duty set forth by the law and concealment the fact and results of processing from a data subject.

At this general conditions for search activity are set forth. They are as follows: gathering evidence if it is impossible to be done in another way or to call for evidence through other procedural measures, if it is impossible or difficult to define the date or if it can hurt the criminal case interests (Section 2); safety of life, health and property of a person as well as environmental safety (Section 3); information obtained by search activity is evidential if it has been obtained in conformity with legislative requirements (Section 4); search activities can be performed directly by special-purpose bodies, or by agencies, divisions and officials subordinate and authorized to perform search activities, as well as by police agents, secret agents and persons engaged to perform covert cooperation (Section 5); compulsory authorization by a judge and voluntary participation in search activity of "deputies of all power levels, judges, prosecutors, lawyers, clergy and elected and assigned state officials" (Section 6); handing over to other investigative authorities: in case of request, information obtained by search activities is sent together with photographs, films, audio and video records and other data records made in the course of search activity (Section 7).

Search activities are also set forth. These can be performed in respect of the following persons: in case when there are serious reasons to suppose that a person is committing a crime; a person put on the wanted list (Section 1); a person owning or possessing property subject to confiscation (Section 2); a person suspected in a criminal case or there are reasons to suspect that he has committed or is committing the stated crime (Section 3); in case there are sufficient reasons to suppose that a person cooperates with a suspect (Section 4).

The specific feature is that the Police Department, the Border Police Department and the Security Police Department can perform the following search activities: covert inspection of mail; covert control of information or wire-tapping; the use of police agent's services. At this, the Prisons Department of the Ministry of Justice can perform the same activities except for the latter one (Article 126³ of the CPC).

Search activities regulated by Article 126³ of the CPC of the Republic of Estonia include: covert penetration into a building, premises, a vehicle, a fenced territory or a computer system, if it is necessary for the purposes of search activity. And it is important that search activities can be performed with written authority from a prosecutor or a judge (Section 1 of Article 126⁴ of the CPC). It is also important that an official of a body

effecting search activities or a person engaged in these activities should produce a report on the search activities on the basis of information obtained in the course of these activities (Section 1 of Article 126¹⁰ of the CPC).

Also, in comparison with the new CPC of the Republic of Kazakhstan, it should be noted that Estonian legislators have not transformed operational search activities into undisclosed investigative activities, but defined them as search activities. However, some types of operational search activities in the CPC are similar. At this, one can see a difference in the requirement to authorization for operational search activities, as it has been mentioned above. Besides, voluntary consent of “deputies of all power levels, judges, prosecutors, lawyers, clergy and elected and assigned state officials” for participation in operational search activities is not provided. As far as the national CPC is concerned, the Kazakhstani legislator doesn’t provide any explanations. Apart from the case when undisclosed investigative activities are prohibited to be performed in respect of lawyers rendering professional assistance, except for the case when there are reasons to suppose that they prepare or have committed grave or especially grave crimes (Section 8 of Article 232 of the CPC). Also, it is prohibited to perform undisclosed investigative activities and to use information obtained in the course of their performing for the purposes not stipulated by this Code (Section 9 of Article 232 of the CPC).

After studying the CPC of the Republic of Latvia certain peculiar details stipulated by Chapter 11 (Articles 210-234 of the CPC of the Republic of Latvia dated 2005) (the Criminal Procedure Code of the Republic of Latvia, 2005) can be noted. Firstly, operational search activity is transformed into special investigative activities; secondly, special investigative activities are performed only in investigation of grave and especially grave crimes in execution of an order of an investigating judge. The order of an investigating judge is not required if all persons living or working in a publicly inaccessible premises have given their consent for special investigative activities. A crime investigator or organizations and persons (for instance, post office workers) by order of the crime investigator have a right to perform special investigative activities if it doesn’t require the use of operational means and methods. Otherwise performing special investigative activities is entrusted to authorized organizations. Article 230 of the CPC of the Republic of Latvia straightly qualifies results of special investigative activities as evidence.

Whereas according to the new CPC of the Republic of Kazakhstan, undisclosed investigative activities are performed without informing persons engaged in a criminal trial and whose interests it concerns, as it has been mentioned above. Besides, undisclosed investigative activities are performed by the order of a crime investigator, law enforcement and special governmental authorities by agreement with a prosecutor.

According to Section 1 of Article 229 of the CPC of the Republic of Latvia protocols of special investigative activities, reports, audio records, images, photographs, other results recorded through technical means, seized items and documents or copies are used in proving in the same way as results of other investigative activities. At this, Estonian and Latvian legislators note that it is an operational search authority that is responsible for drawing up a report on results obtained and then present it to a crime investigator who makes up a protocol of results of performed investigative activities.

However, Kazakhstani legal scholars note that in case of such a stipulation, disregard of the criminal procedure form of drawing up a statement of case is observed. It consists in the very fact that a criminal investigator draws up a protocol where he records only results. The very process of investigative activities can’t be recorded in a protocol due to external reasons, and thus, in future it is quite possible that results of undisclosed investigative activities can be considered unreliable (Bachurin, Syzdykov, & Erzhanov, 2011).

Kazakhstani legislators have taken this fact into account and in the CPC of the Republic of Kazakhstan set forth presentation of results of undisclosed investigative activities in another way: “upon completion of undisclosed investigative activities all materials relevant to the case and obtained in the course of its conduct are confidentially presented to an authority of prejudicial inquiry with an accompanying letter” (Section 1 of Article 237 of the CPC). Results of undisclosed investigative activities are examined by an authority of prejudicial inquiry in compliance with the requirements of Articles 47 and 124 of this Code with participation of an expert and an appropriate official of a body of inquiry, if necessary. A protocol of examination results is drawn up in compliance with Articles 47 and 199 of this Code. The protocol reports results of undisclosed investigative activities performed (Section 1 of Article 238 of the CPC).

In its turn, in comparison with the codes of the above stated Baltic Republics in the Criminal Procedure Code of the Republic of Lithuania only two following peculiar features are noticeable:

- Undisclosed procedural activities (along with taking in custody, detention, fingerprinting, sampling, survey, search, seizure, identification and etc.) aimed at gathering evidence are not included into the chapters, but

occupy the entire Chapter 12 about Other Measures of Procedural Compulsion (the Criminal Procedure Code of the Republic of Lithuania, 2003);

- Measures of procedural compulsion include only three undisclosed activities, along with recording and wiretapping of information transmitted through communication networks: 1) A simulated crime; 2) Covert surveillance; 3) Activities of undercover officials of prejudicial inquiry.

For the rest it can be said that all investigative activities in the criminal procedure laws of Lithuania are more or less similar to those in the CPCs of Estonia, Latvia and the Republic of Moldova.

As far as the CPC of the Republic of Moldova is concerned it should be noted that it was adopted in 2003 and in 2012 was fundamentally supplemented. Finally, in this state the activity being studied was referred to as special search activity. Special search activity is a complex of public or undisclosed activities aimed at prosecution of crime and performed by search officers in the framework of prosecution of crime only under the conditions and in the order stipulated by this Code (Section 1 of Article 132-1 of the CPC) (the Criminal Procedure Code of the Republic of Moldova, 2012).

Special search activities are performed in the following cases: if criminal proceedings' objectives can't be gained in another way and/or if gathering of evidence can be significantly hurt; if there are reasonable suspicions with regard to preparation to or commitment of a grave, especially grave or extremely grave crime with legal seizure; if these activities are necessary and proportionate to restriction of the basic rights and freedoms of a person (Section 2 of Article 132-1 of the CPC).

According to Clause 8 of Section 2 of Article 93 of the CPC of the Republic of Moldova, procedural acts concerning results of special search activities and their appendices, including transcripts, photographs, records and etc., are sources of evidence. At this the following is provided: undisclosed procedural monitoring and control of financial transactions as well as access to financial information; recording with the use of technical means and methods as well as localization and tracing of objects through the global positioning system (GPS) or other technical means; retrieval of information from electronic communications service providers (Article 132.2 of the CPC).

It is important that the CPC of the Republic of Moldova also gives additional guarantees for people engaged in special search activities, for instance: audio-broadcasting of stories with the use of voice changing technical means.

Such type of special search activities as cross-board supervision (Article 138.1 of the CPC) is of a particular interest. As envisioned by the legislators, cross-board supervision permit officials of a foreign prosecution authority to perform surveillance of a person suspected in commitment of a crime within the territory of the Republic of Moldova upon a preliminary request to the Office of the General Prosecutor for legal assistance in further surveillance over the territory of Moldova with the purpose of his further extradition (except for the cases when international treaties stipulate other rules).

In studying concepts and applicability of this system in the CPC of the Republic of Kazakhstan a conclusion has been made that there is no clear definition of cross-border supervision in the national legal doctrine as well as in the system of international law. Moreover, primarily the term "cross-border" is defined in connection with crossing a border or leaving the state. And the term "supervision" refers to a form of state authorities activity for securing of law. Besides, in the works of Russian legal scholars such concept as cross-border organized crime is noted. It is defined as a complex anti-social phenomena ignoring state borders. In the Russian theory of law cross-border organized criminal activity means performing by criminal organizations illegal transactions associated with transfer of information and cash flows, physical objects, people and other physical and intangible resources abroad in order to use favorable market conditions in one or more states and obtain significant benefit as well as in order to successfully avoid social control by means of corruption, violence and the differences in criminal justice systems of different countries.

The most common cross-border crimes are the following: illicit trafficking of firearms and ammunition; illicit trafficking of narcotic drugs and psychotropic substances; illicit car and antiques smuggling; arrangement of passes for irregular migration and human trafficking; money laundering. One of their sources is smuggling from abroad. The main smuggling channels go across south-east borders of Central Asia and through the Republic of Kazakhstan to Russia and Europe. As a result, law enforcement authorities have difficulties in detecting crimes due to insufficiently clear statutory regulation of prevention of cross-border organized crimes.

However, on January, 1, 2015 the Eurasian Economic Union (Russia, Kazakhstan and Belarus) is put into force. In its framework along with economic integration the process of harmonization and unification of legal norms of

Member Nations will be performed.

Also, with regard to adoption of the new CPC of the Republic of Kazakhstan on January, 1, 2015, certain questions concerning application of undisclosed investigative activities can arise.

Due to the fact that Article 89 of the CPC of the Russia Federation regulates investigative and operational search activities of a crime investigator. It mentions that results of operational search activities are prohibited for the use in proving if these results do not comply with the requirements to evidence (the Criminal Procedure Code of the Russian Federation, 2011).

Many Russian legal scholars consider that Article 89 of the CPC provides a very vague prohibition of the use of results of operational search activity in proving in case if these results do not comply with the requirements of this Code (Statkus, 2007).

Federal Act on Operational Search Activity dated August, 12, 1995, stipulates that results of operational search activity can be presented to a crime investigator processing a criminal case upon the order of the head of an authority effecting operational search activity (Article 11) (Federal Act on Operational Search Activity, 1995).

According to the Instruction on the Procedure of Presenting Results of Operational Search Activity to an Inquiry Body, a Crime Investigator, a Prosecutor or to the Court, results are presented in the form of a summarized official statement (a memo fact sheet) or as originals of appropriate operational search documents (On Approval of the Instruction on the Procedure of Presenting Results of Operational Search Activity to an Inquiry Body, a Crime Investigator, a Prosecutor or to the Court (ceased to be in force since 27. 05. 2007)). The results of these activities include indication of a source of potential evidence or an item which may become an evidence as well as data permitting in the course of judicial proceeding to verify evidence created on this basis.

Up to the present there is no agreement among Russian legal scholars with regard to the use of results of operational search activity in criminal proceedings, but this problem has been of increased interest for many years and there are different views on it in the works of Baranov, A., Bednyakov, D., Bozrov, V., Darmayeva, V., Dolya, E., Lapatnikov, M., Mazunin, Y., Petrukhin, I., Pobedkin, A., Trubnikova, T., Sharikhin, A., Shmatov, M. and others.

After studying the CPC of the Republic of Belarus, we will note that we have found different terms for results of operational search activity. In some cases they are referred to as materials (Article 101 of the CPC), in other items and documents (Article 103 of the CPC). According to the new CPC of the Republic of Belarus application of operational search activity in criminal proceedings indicates its importance for proving (Bibilo, 2011).

However, Section 3 of Article 16 of Operational Search Activity Act of the Republic of Belarus details that it is "data about results of operational search activities" which are "evidence" in operational search sense that is used (Operational Search Activity Act of the Republic of Belarus, 1999). The term "evidence" in criminal procedural sense is defined in Article 88 of the CPC: "Evidence is represented by any factual data". I.e. materials obtained in the course of operational search activity can be considered to be a source of evidence in case they are obtained in compliance with the legislation of the Republic of Belarus, presented, verified and evaluated in the order stipulated by this Code (Article 101 of the CPC) (the Criminal Procedure Code of the Republic of Belarus, 1999).

Sources of evidence are also represented by protocols of investigative activity drawn up in the order stipulated by the Code and verifying circumstances and facts; by protocols of investigative and operational search activity concerning wiretapping and recording of conversations effected with the use of technical means and other conversations, drawn up in the order stipulated by the law and accompanied by the appropriate records; as well as by protocols of juridical session indicating the course of juridical activity and its results (Article 99 of the CPC) (Bibilo, 2011).

However, many Belorussian legal scholars consider that materials obtained in the course of operational search activities do not always represent a source of evidence. In view of its specific character, results of operational search activity are not always of procedural value and cannot always be formally used in criminal proceedings. And this constitutes a serious problem (Proceedings of the II International Scientific and Training Conference, 2014).

Thus, it can be said that the criminal procedure legislation of Russia and Belarus use the same approach to regulation of operational search activity in the framework of criminal proceedings and the same current problems of their use in proving. However, Russian legal scholars consider that the legislation and development of the legal sciences create necessary and sufficient opportunities for elaboration of new procedural forms which will comply with the requirements of lawfulness and justness of special undisclosed investigative activities (Popov, 2014). At this, they consider that from the perspective of criminal procedural terminology these investigative

activities can be successfully referred to as “complex”. Though the term “complex investigative activities” is self-explanatory and fully appropriate, we still prefer the term “special investigative activities”.

5. Conclusion

In conclusion we may note that, according to the most of legislators of the considered states, any activities aimed at detection, solution and investigation of crimes should be regulated by a criminal procedure law. Legislators of the Republic of Kazakhstan also adhere to the same assumption. So, in the course of reforming the CPC Chapter 30 about Undisclosed Investigative Activities has been provided. We consider some points in it should be improved.

For instance:

- 1) We suggest that undisclosed investigative activities should be performed only with respect of grave and especially grave crimes.
- 2) Undisclosed investigative activities should be authorized by an investigating judge. While a prosecutor should present a motion to the investigating judge for the authorization, thus he will be engaged in a pre-trial proceeding.
- 3) There are good reasons for countries of the EurAsEC (Russia, Kazakhstan and Belarus) to accept a coordinated decision regarding unified criminal proceedings and the practical use of operational search activity data in proving.

Moreover, in the context of further study and wider application of the norms of the CPC in criminal pre-trial proceedings we suppose it necessary to consider such type of activity as cross-border supervision, which can be easily performed within the territory of the Republic of Kazakhstan. Adhering to this procedure will allow expanding the framework of state-to-state assistance in investigation of crimes and criminal extradition of persons suspected in committing or having committed a crime. In its turn, it indicates the prospects of further study of this issue.

References

- Bachurin, S., Syzdykov, K., & Erzhanov, T. (2001). Critical comments and suggestions for the draft of Act on Introduction of Amendments in certain Legislative Acts of the Republic of Kazakhstan concerning Improvement of Criminal and Criminal Procedure Legislation (concerning operational search activity). *Bulletin Khasharshy, Karagandy Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan*, 4, 178.
- Bibilo, V. (2011). *Issues of legal science: Selecta*. Minsk: Law and Economics. Retrieved November 8, 2014, from <http://www.twirpx.com/file/1157652/>
- Bilenchuk, P. D. (Ed.). (1999). *Transnational crime and the state of transformation: Textbook* (p. 272). Moscow: Atika.
- Cross-border*. (2014). Retrieved December 19, 2014, from http://dic.academic.ru/dic.nsf/dic_synonims/179795/
- Current problems of using video records in operational search activity. (2014). *Proceedings of the II International Research and Training Conference. Crime Prevention: Theory and Practice*. Mogylev: College of Higher Education of the Ministry of Internal Affairs of the Republic of Belarus. Retrieved November 9, 2014, from <http://www.twirpx.com/file/1380462/>
- Federal Act on Operational Search Activity No. 144-FZ*. (1995). Retrieved January 24, 2014, from http://www.libertarium.ru/l_sormlaw_101
- Ginsburg, A., & Belkin, A. (1999). *Criminalistical tactics*. Almaty. Retrieved November 20, 2014, from <http://mir.zavantag.com/download/pravo-437319/437319>
- Jursimbaev, S. (2011). Criminal Procedure Law of the Republic of Kazakhstan. *General Part. Pre-trial Proceeding: A textbook*. Almaty: Publishing House “NURPRESS”.
- Meishvili, Z. (2010). *Guide to the New Criminal Procedure Code of Georgia*. (2014). Retrieved November 4, 2014, from [http://www.legalaid.ge/cms/site_images/UNDP%20 brochures/rus/CPC_RUS.pdf](http://www.legalaid.ge/cms/site_images/UNDP%20brochures/rus/CPC_RUS.pdf)
- Mikhailov, M. (2013). Judicial Control over Obtaining Evidence in Crime Investigation. *A lecture for crime investigators and judges*. Simferopol. Retrieved January 24, 2014, from <https://www.youtube.com/user/MikhailovMikhail>

- On Approval of the Instruction on the Procedure of Presenting Results of Operational Search Activity to an Inquiry Body, a Crime Investigator, a Prosecutor or to the Court (ceased to be in force since 27.05.2007). (1998). *Approved by the Order of the Federal Agency of the Federal Security Service, the Ministry of Internal Affairs, the Federal Guard Service, the Federal Border Service, the State Customs Committee, the External Intelligence Service of the RF, conferred with the Office of the Prosecutor General of the RF*. Retrieved November 12, 2014, from <http://docs.cntd.ru/document/901716858>
- Operational Search Activity Act of the Republic of Belarus No. 289-3*. (1999). Retrieved November 8, 2014, from http://base.spinform.ru/show_doc.fwx?rgn=1992
- Operational Search Activity. (1994). *Act No. 154-XIII of the Republic of Kazakhstan*. Retrieved November 18, 2014, from http://online.zakon.kz/Document/?doc_id=1003158
- Popov, A. (2014). Problems of search basics integration into stages of preliminary investigation. *Criminal processing of the Russian Federation. Topical lectures: A manual*. Retrieved November 13, 2014, from <http://pfncfu.ru/data/files/docs/science/%D0%A3%D0%B3%D0%BE%D0%BB%D0%BE%D0%B2%D0%BD%D1%8B%D0%B9%20%D0%BF%D1%80%D0%BE%D1%86%D0%B5%D1%81%D1%81%20%D1%81%D0%BE%D0%B2%D1%80%D0%B5%D0%BC%D0%B5%D0%BD%D0%BD%D0%BE%D0%B9%20%D0%A0%D0%BE%D1%81%D1%81%D0%B8%D0%B8.pdf>
- Prischepa, G. (2009). The Criminal Procedure Code: whether to specify a mechanism of legal regulation of preinvestigation check or adopt a new pre-investigation procedure code? *Zan zhane zaman*, 9(106). Retrieved November 20, 2014, from <http://pravo.zakon.kz/166868-dosledstvennuju-proverku-v-ramki-upk-g.html>
- Shymukhanov, A. (2008). Improvement and development of the operational search legislation of the Republic of Kazakhstan. *Synopsis of a thesis, Karaganda*. Retrieved November 28, 2014, from <http://elibrary.kz/databases/diss/detail.php?ID=101267>
- Statkus, V. (2004). *The Use of Results of Operational Search Activity in Criminal Proceedings as a Legal Institution. Synopsis of a thesis, Nizhny Novgorod*. Retrieved November 12, 2014, from <http://lawtheses.com/ispolzovanie-rezultatov-operativno-rozysknoy-deyatelnosti-v-ugolovnom-protseesse-ka-k-pravovoy-institut>
- Supervision*. (2014). Retrieved December 19, 2014, from <https://ru.wikipedia.org/wiki/Надзор>
- The Constitution of the Republic of Kazakhstan. (1995). Retrieved January 24, 2014, from <http://www.constitution.kz/>
- The Criminal Procedure Code of the Kazakh Soviet Socialist Republic. (1997). Almaty: Publishing House “Adilet Press”. Retrieved November 18, 2014, from http://kazakhstan.news-city.info/docs/sistemsp/dok_peraqi.htm
- The Criminal Procedure Code of the Republic of Belarus: The Code of the Republic of Belarus No. 295-3. (1999). *National Center of Legal Information of the Republic of Belarus*. Minsk. Retrieved November 8, 2014, from <http://pravo.belnovosti.by/kodeksy/3393-ugolovno-processualnyj-kodeks.html>
- The Criminal Procedure Code of the Republic of Estonia. (2008). *Tallin*. Retrieved November 1, 2014, from <http://zakon24.ee/ugolovno-processualnyj-kodeks/>
- The Criminal Procedure Code of the Republic of Kazakhstan. (1998). Almaty. Retrieved November 18, 2014, from <http://www.pavlodar.com/zakon/?dok=00147&ogl=all>
- The Criminal Procedure Code of the Republic of Kazakhstan. (2014). *Act No. 231-V of the Republic of Kazakhstan*. Retrieved November 22, 2014, from http://online.zakon.kz/Document/?doc_id=31575852
- The Criminal Procedure Code of the Republic of Latvia. (2005). *Riga*. Retrieved November 1, 2014, from http://www.pravo.lv/kdks_z.html
- The Criminal Procedure Code of the Republic of Lithuania. (2003). *Vilnius*. Retrieved November 1, 2014, from http://www.adhdportal.com/book_3284_chapter_9_ZAKON_LITOVSKOJJ_RESPUBLIKI.html
- The Criminal Procedure Code of the Republic of Moldova. (2012). *Kishinev*. Retrieved November 2, 2014, from <http://pravo.org.ua/files/.pdf>
- The Criminal Procedure Code of the Republic of Ukraine No. 4651-VI. (2012). Retrieved November 4, 2014, from http://kalinovsky-k.narod.ru/zakon/UPK_Ukraini_2012.htm
- The Criminal Procedure Code of the Russian Federation. (2011). Moscow. Retrieved November 12, 2014, from <http://docs.pravo.ru/kodeks-ugolovno-protsessualnyj/67800796/>

- The Eurasian Economic Union: Russia, Kazakhsta, Belarus.* (2014). Retrieved January 24, 2014, from https://ru.wikipedia.org/wiki/%C5%E2%F0%E0%E7%E8%E9%F1%EA%E8%E9%FD%EA%EE%ED%E%EC%E8%F7%E5%F1%EA%E8%E9_%F1%EE%FE%E7
- The Model Criminal Procedure Code for Member Nations of the Commonwealth of Independent States (adopted by Resolution of the Interparliamentary Assembly of CIS Member States.* (1996). IS PARAGRAPH. Retrieved October 19, 2014, from <http://pravo.kulichki.com/zak/megd/meg02859.htm>
- Toleubekova, B. (2005). Criminal Procedure Law of the Republic of Kazakhstan. In *General Part: Academic Course. Book Two.* Almaty: Zheti zhargy. Retrieved November 18, 2014, from <http://www.flip.kz/catalog?prod=9279>
- Tomin, V., & Polyakov, M. (2012). Basic characteristics of criminal processing in foreign countries. *A file lecture.* Nizhny Novgorod. Retrieved January 24, 2014, from <http://www.twirpx.com/file/1072279/>
- United Nations Office on Drugs and Crime. (2014). *An analytical review.* Legal regulation of special (undisclosed) investigative activities in countries of the former Soviet Union. In the context of supporting the criminal justice reform in the Republic of Kirgizstan. Retrieved January 24, 2014, from <http://lprc.kz/files/library/206/rus/%D0%A1%D0%BF%D0%B5%D1%86%D0%B8%D0%B0%D0%BB%D1%8C%D0%BD%D1%8B%D0%B5%20%D1%81%D0%BB%D0%B5%D0%B4%D1%81%D1%82%D0%B2%D0%B5%D0%BD%D0%BD%D1%8B%D0%B5%20%D0%B4%D0%B5%D0%B9%D1%81%D1%82%D0%B2%D0%B8%D1%8F.pdf>

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/3.0/>).